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Federal Communications Commission
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Amendment of the Commission's	)	WT Docket No. 95-157
Rules Regarding a Plan for	)	RM-8643
Sharing the Costs of Microwave	)	
Relocation	)	

To: The Commission

PETITION FOR RECONSIDERATION AND/OR CLARIFICATION

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY

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TABLE OF CONTENTS

SUMMARY

The Commission's microwave relocation "cost-sharing rules" require Personal Communications Service ("PCS") licensees that benefit from the relocation by other parties of microwave paths in their frequency block to reimburse the PCS licensee or microwave incumbent that paid for the relocation. PCS licensees that had previously relocated microwave paths may seek reimbursement for expenses incurred since April 5, 1995. However, when the Commission recently modified the cost-sharing rules to allow microwave incumbents to seek reimbursement for their "self-relocation" expenses, it failed to make clear that incumbents are also eligible for reimbursement of prior expenses incurred since April 5, 1995.

The Commission must clarify or, if necessary, reconsider its rules to treat microwave incumbents equally and permit reimbursement to incumbents of self-relocation expenses incurred since April 5, 1995. This is particularly equitable where the incumbent had entered into a relocation agreement with an early PCS licensee regarding only some of the 2 GHz paths on the incumbent's microwave network, and the incumbent needed to relocate the remaining paths at its own expense. Such self-relocation, regardless when it occurred, promoted early, competitive PCS deployment and provided a substantial benefit to subsequent PCS licensees,

who should now pay their fair share of the relocation expenses.

The Commission should also reconsider its decision to depreciate the reimbursement payable to incumbents under the cost-sharing rules. There is no rational basis for applying depreciation to incumbents, who should be treated in the same manner as a PCS relocator that clears paths outside of its frequency block or service area.

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In the Matter of Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation	)))))	WT Docket No. 95-157 RM-8643

To: The Commission

PETITION FOR RECONSIDERATION AND/OR CLARIFICATION

The South Carolina Public Service Authority ("Santee Cooper"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. §1.429, hereby submits the following Petition for Reconsideration and/or Clarification of the Commission's Second Report and Order, FCC 97-48, (released February 27, 1997), 62 Fed. Reg. 12752 (March 18, 1997) in the above-captioned proceeding.

Santee Cooper is a state-owned electric and water utility serving South Carolina, and is the licensee of a 51-path 2 GHz microwave network that provides critical communications links for its state-wide operations. Santee Cooper previously entered into an agreement with a Personal Communications Service ("PCS") licensee to relocate a minority of the paths on its microwave network. As a result, Santee Cooper was forced to pursue other alternatives for its remaining paths to maintain the integrity of its communications system.[1]

Santee Cooper requests that the Commission clarify the "cost-sharing" rules adopted in this proceeding to remove any uncertainty as to the ability of an incumbent microwave licensee to seek reimbursement for voluntary self-relocation of 2 GHz microwave paths that occurred anytime after April 5, 1995. In particular, reimbursement should be permitted where the self-relocated paths were part of a microwave network that also contained paths being cleared pursuant to a negotiated relocation agreement with a PCS licensee. The Commission should also modify its rules to eliminate the use of a depreciation factor for microwave incumbents participating in the cost-sharing process.

I. BACKGROUND

The Commission previously adopted rules in this proceeding creating a "cost-sharing" process that allows PCS licensees that relocate microwave paths outside their spectrum blocks or license areas to receive at least partial reimbursement from other PCS licensees who benefit from the clearing of those microwave paths. First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8825, 8860-67 (1996)("First Report and Order"). As explained in

[1] Santee Cooper filed comments in response to the First Report and Order and Further Notice of Proposed Rulemaking in this proceeding on May 28, 1996.

the Second Report and Order, the Commission concluded that the

> cost sharing plan would benefit the public interest because (1) it distributes relocation costs equitably among PCS licensees, and (2) it promotes the expeditious relocation of multi-link systems, which benefits microwave incumbents as well as PCS licensees.

Second Report and Order at ¶ 22. The initial cost-sharing rules for PCS licensees made clear that a "PCS relocator may submit receipts or other documentation to the clearinghouse for all relocation expenses incurred since April 5, 1995." See First Report and Order, 11 FCC Rcd at 8909 (adding a new Section 24.245(b)).[2] This provision appears to apply notwithstanding the requirement in Section 24.245 that a "PCS relocator must submit documentation of the relocation agreement to the clearinghouse within ten business days of the date a relocation agreement is signed with an incumbent." Id. at 8909.

In the First Report and Order (which also included a "Further Notice of Proposed Rulemaking"), the Commission reached a "tentative conclusion" that microwave incumbents should also be permitted to participate in cost-sharing to allow an incumbent microwave licensee to obtain reimbursement if it voluntarily relocates 2 GHz paths at its own expense. First Report and Order, 11 FCC Rcd at 8871-72. Just as for the PCS relocator, the Commission recognized that "allowing incumbent participation might facilitate

[2] See also Notice of Proposed Rulemaking, WT Docket 95-157, 11 FCC Rcd 1923, 1939 (1995).

system-wide relocations and could potentially expedite the deployment of PCS." Id. at 8872. The First Report and Order did not include any suggestion that the cost-sharing rules, when applied to incumbents, would not cover expenses incurred since April 5, 1995.

In the Second Report and Order, the Commission adopted its tentative conclusion and allowed microwave incumbents to participate in cost-sharing. However, the rules as modified in the Second Report and Order do not make clear that incumbents may seek reimbursement for expenses incurred since April 5, 1995. Section 24.245(a) was amended to indicate that "a voluntarily relocating microwave incumbent must submit documentation of the relocation to the clearinghouse within ten business of the date that relocation occurs." However, Section 24.245(b), while otherwise modified to include references to microwave incumbents, does not indicate that a microwave incumbent "may submit receipts or other documentation to the clearinghouse for all relocation expenses incurred since April 5, 1995."

The Commission never proposed to treat incumbents differently from PCS licensees regarding prior expenses, and did not suggest in the Second Report and Order that such a distinction existed. Therefore, Santee Cooper seeks clarification that incumbents may seek reimbursement for expenses incurred since April 5, 1995, and suggests that

Section 24.245(b) needs to be corrected accordingly. On the other hand, if the Commission did not in fact intend to allow reimbursement of earlier expenses incurred by incumbents, then the Commission must reconsider its decision for the reasons set forth below.

II. MICROWAVE INCUMBENTS SHOULD BE ELIGIBLE FOR REIMBURSEMENT OF RELOCATION EXPENSES INCURRED AFTER APRIL 5, 1995, AT LEAST WHERE THE SELF-RELOCATION WAS NECESSARY TO COMPLETE A SYSTEM-WIDE RELOCATION.

Assuming that the Commission intended to treat incumbents differently from PCS relocators, there is no explanation offered for such a distinction in the Second Report and Order. As the Commission is well aware, "an agency must provide an adequate explanation before it treats similarly situated parties differently." Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994); Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965). Here, no explanation in offered. Moreover, no rational basis for the distinction exists.

The purpose and rationale of the cost-sharing rules suggest that relocation costs incurred since April 5, 1995, should be eligible for reimbursement under cost-sharing, regardless of whether those expenses were incurred by incumbents or by PCS licensees. In both cases, later PCS licensees benefit from the prior relocation of interfering microwave paths, and should pay their fair share of the relocation costs. Otherwise, the PCS latecomers will receive a free-ride at the expense of incumbent microwave licensees.

Reimbursement of prior incumbent relocation expenses is particularly appropriate where an incumbent entered into a relocation agreement to clear some of the paths on its network, but found it necessary to relocate the remaining paths at its own expense. There are a number of factors which, in combination, could have led to such a situation including the following: (1) a PCS licensee was prepared to pay for the relocation of some of an incumbent's paths, but lacked the funds or was simply unwilling to relocate the entire microwave network; (2) a system-wide replacement was necessary to avoid technical and operational problems associated with mixing old analog and new digital paths; (3) a system-wide replacement offered significant economies of scale and operational advantages for all parties;(4) other PCS entities that would eventually benefit from relocation of the microwave system had not yet been licensed or were not yet in a position to engage in negotiations; and (5) the incumbent was a large entity with the financial capability to complete the entire project.

While the number of incumbents who faced such a situation may be small, they should be entitled to participation in the cost-sharing process, notwithstanding the fact that their relocation expenses were incurred prior to the Second Report and Order. An incumbent that took the step to relocate portions of its own network under these circumstances substantially advanced the development of PCS, first by allowing the initial PCS licensee to proceed and begin early PCS operations and, second, by clearing other (and in some cases all) 2 GHz frequencies in a large geographic area, thus allowing for rapid PCS deployment by many other PCS licensees.

The Commission has recognized that "providing an incentive to move entire microwave systems (and thereby enabling a seamless transition to the new frequency) is a major benefit of adopting a cost-sharing plan." Notice of Proposed Rulemaking, WT Docket 95-157, 11 FCC Rcd 1923, 1937 (1995). For PCS licensees, and the public, the advantages are obvious. Large numbers of 2 GHz microwave links are cleared at one time, facilitating early, competitive PCS offerings in the marketplace. System-wide replacements also avoid the need for time-consuming multiple negotiations between incumbents and each PCS licensee, which can be a major impediment to relocation of very large, complex microwave networks.

System-wide projects also avoid the serious engineering and operational problems that occur when attempting to integrate digital and analog paths. When replacing a current system, which is most likely analog technology, the only rational approach is to move to digital technology which offers state-of-the-art capability and reliability. Indeed, analog microwave technology is now largely obsolete, and the cost differential between analog and digital equipment has been substantially reduced or eliminated. The problem is that placing a new digital path in the midst of a large integrated analog microwave network adds additional costs and compromises reliability. That loss in reliability is unacceptable for incumbents whose microwave networks support critical communications operations essential for maintaining public utility services, transportation, and/or the safety of life and property.

Finally, a system-wide replacement may provide significant economies of scale in design, equipment acquisition, and construction. Incumbent microwave licensee willingness to undertake such system-wide projects thus directly benefits the initial PCS licensee willing to pay for the relocation of at least some paths in the system, and (to the extent cost-sharing will apply) the later PCS licensees who ultimately contribute their fair share of the relocation expenses.

As discussed above, there are substantial public benefits to ensuring that incumbents be allowed reimbursement for prior relocation. To the extent that there may be concern that some incumbents might be reimbursed for prior relocations that would have occurred even without the reallocation of the 2 GHz band, that is a non-issue. If deemed necessary, the concern could be addressed by limiting incumbent reimbursement for prior expenses to those situations where the incumbent's self-relocation was part of a system-wide replacement initiated by an agreement with a PCS licensee to pay for the relocation of some of the paths on that network. Obviously, in that situation the relocation was an integral part of a program to accommodate PCS in the 2 GHz band.

Those incumbents that were able to clear portions of their own network to complete a system-wide replacement provided a valuable public benefit. When faced with an offer from an early PCS licensee to relocate only a few of its microwave network paths, the incumbent could have (1) simply accepted the offer, and possibly compromised its network without clearing any frequencies for other PCS licensees, (2) refused to move (at least until the mandatory negotiation period), thus stalling PCS deployment in the relevant market, or (3) assumed the cost of relocating the remainder of its network, hoping that the FCC would allow for at least partial cost reimbursement. Those incumbents able to choose the last option served the public interest by facilitating early, competitive PCS deployment. Their relocation expenses, including expenses prior to the Second Report and Order, should be eligible for cost sharing.

III. THE COST-SHARING DEPRECIATION FACTOR SHOULD NOT APPLY TO MICROWAVE INCUMBENTS.

The Commission integrated into its original cost-sharing formula a depreciation factor that reduces over time the amount of reimbursement payable by late-to-market PCS licensees to first-to-market PCS relocators. In the Second

Report and Order, the Commission concluded that the same depreciation factor should apply to reimbursement of incumbents. However, the Commission failed to present any rational basis for that decision.

The principal purpose of the depreciation factor as applied to PCS relocators is to offset the competitive benefit that an early entrant PCS licensee (i.e., the PCS "relocator") derives from being first to the market. First Report and Order, 11 FCC Rcd at 8862. Obviously, microwave incumbents do not participate in the PCS market, and gain no such marketplace advantage by self-relocating their microwave paths. On its face, therefore, that rationale does not apply to microwave incumbents.

The Commission suggests in the Second Report and Order, however, that early self-relocation "may" provide incumbents with certain other benefits such as "options for obtaining alternative spectrum, more control over the relocation process, and reduce[d] uncertainty about further operations." Second Report and Order, at ¶ 27. While those benefits may, in fact, be realized by some incumbents, the entire relocation process is far more often a burden and unnecessary distraction from the incumbent's principal business or governmental activity. In any event, even where there are marginal advantages to early self-relocation, those advantages pale in comparison to the substantial market benefits realized by PCS relocators.

The Commission's other reason for applying depreciation to incumbents is to create "an incentive for the relocator to minimize costs because its own share of the cost is not depreciated." Second Report and Order at ¶ 27. However, as several parties have noted in this proceeding, incumbents already have incentives to minimize relocation costs.[3] In any event, while depreciation might possibly provide additional incentives for incumbents to minimize costs in future self-relocation, depreciation is irrelevant to microwave incumbents who had voluntarily relocated paths prior to the Second Report and Order.

As discussed above, incumbent self-relocation expenses incurred prior to the Second Report and Order should be eligible for cost-sharing, at least when the self-relocation is related to an agreement with a PCS licensee to relocate only a portion of the incumbent's microwave network. Applying depreciation in those situations is unnecessary as the incumbent already had a far more substantial reason to minimize its relocation costs. Until adoption of the Second Report and Order, there was no assurance that incumbents would be able to participate in cost-sharing at all. Incumbents, therefore, had every incentive to keep their self-relocation costs to a minimum in the event that those costs would ultimately need to be absorbed.

[3] See Comments of UTC at 7 (filed May 28, 1996); Comments of Basin Electric Power Cooperative at 4 (filed May 28, 1996); Comments of American Petroleum Institute at 13 (filed May 28, 1996).

Finally, there is an inherent inconsistency in the application of the depreciation rules to incumbents, but not to PCS relocators who clear paths "wholly outside [their] service area/and or spectrum block." First Report and Order, Appendix A, at ¶ 17. Such a PCS relocator receives no direct benefit from clearing those paths, and is entitled to 100% reimbursement of its relocation costs (up to the caps), without any depreciation. The Commission stated that this different treatment is based on the need to "encourage PCS licensees not to delay relocations in the hope that other PCS entities would relocate the links." Id.

Microwave incumbents who voluntarily relocate paths should be treated the same as PCS relocators who clear paths outside of their service area and/or spectrum block. In both cases, the relocator receives little or no direct benefit from the relocation.[4] In addition, just as the exemption from depreciation encourages PCS licensees to replace paths which they normally would have very little or no incentive to relocate, microwave incumbents would be more likely to clear paths voluntarily if they were to reimbursed without considering a depreciation factor.

[4] See Comments of American Petroleum Institute at 11 (filed May 28, 1996).

CONCLUSION

For the reasons discussed above, the Commission should clarify its rules to permit microwave incumbents to obtain reimbursement for relocation expenses incurred after April 5, 1995, at least where the self-relocation was related to an agreement with an early PCS licensee to relocate other paths on the incumbent's microwave network. The Commission should also modify its cost-sharing rules to eliminate application of the depreciation factor to microwave incumbents.

Respectfully submitted,

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